STATE OF MICHIGAN

COURT OF APPEALS

TRIMAS CORPORATION and NORRIS CYLINDER COMPANY,

Plaintiffs-Appellees,

v

ZURICH AMERICAN INSURANCE GROUP, STEADFAST INSURANCE COMPANY, and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.,

Defendants,

and

MICHIGAN MUTUAL INSURANCE COMPANY and AMERISURE COMPANIES,

Defendants-Appellants.

UNPUBLISHED
April 10, 2003

No. 235592
Wayne Circuit Court
LC No. 99-934188-CK

ON REHEARING

Before: Murphy, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Defendants Michigan Mutual Insurance Company and Amerisure Companies appeal as on leave granted by order of the Supreme Court an order granting summary disposition to plaintiffs Trimas Corporation and Norris Cylinder Company and finding that defendants have a duty to defend plaintiffs in litigation filed earlier in Texas federal court. We affirm.

The instant case arose from litigation commenced by Horace and Anquitius Rollins in Texas federal court against plaintiff Norris Cylinder Company for the lead poisoning of their son. After the Texas litigation commenced, plaintiffs sought liability coverage from defendants under the employer's liability insurance policy that plaintiffs had purchased from defendants. Defendants denied coverage, claiming that the child's injury was not covered by the policy.

We review de novo a trial court's grant of summary disposition. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). "The purpose of such a motion is to

determine whether the plaintiff has stated a claim upon which relief can be granted." *Id*. at 129-130. We will not affirm summary disposition under MCR 2.116(C)(8) unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a judgment in favor of the nonmoving party. *Trost v Buckstop Lure Co, Inc*, 249 Mich App 580, 584; 644 NW2d 54 (2002).

In interpreting the parties' insurance policy, we

> must first determine whether the policy is clear and unambiguous on its face. We must not create an ambiguity where none exists. Further, we may not rewrite the plain and unambiguous language under the guise of interpretation. Instead, we must enforce the terms of the contract as written, interpreting the unambiguous language in its plain and easily understood sense. [*Gelman Sciences, Inc v Fidelity & Casualty Co*, 456 Mich 305, 318; 572 NW2d 617 (1998), citing *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 206-207; 476 NW2d 392 (1991).]

Under the insurance policy, defendants agreed to

> pay all sums [plaintiffs] legally must pay as damages because of bodily injury to [plaintiffs'] employees, provided the bodily injury is covered by this Employers Liability Insurance.
>
> The damages we will pay, where recovery is permitted by law, include damages:
>
> * * *
>
> 3. for consequential bodily injury to a spouse, child, parent, brother or sister of the injured employee;
>
> provided that these damages are the direct consequence of bodily injury that arises out of and in the course of the injured employee's employment by [plaintiffs] . . . .

Defendants argue on appeal that the trial court misinterpreted the insurance policy. They contend that they are only required to defend plaintiffs in the Texas litigation if the child's injury arose out of his father's injury. Plaintiffs interpret the policy as providing coverage if the child's injury arose out of his father's employment.

Defendants' duty to defend plaintiffs arises if coverage is even arguable. *Royce v Citizens Ins Co*, 219 Mich App 537, 543; 557 NW2d 144 (1996). Thus, an analysis of an insurer's duty to defend must begin with an examination of whether coverage is possible. *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 450-451; 550 NW2d 475 (1996). If coverage is not possible, then the insurer is not obliged to offer a defense. *Id*.

Whether the policy language is ambiguous is a question of law reviewed de novo on appeal. *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999). The policy language is clear if it admits only one reasonable interpretation. *Id*. at 567. The language

is ambiguous if, after reading the entire policy, it can reasonably be understood in different ways. *Id*. at 566-567.

In this case, the exclusionary provision in the parties' insurance policy is ambiguous because it can reasonably be interpreted as meaning defendants will provide coverage for either:

> 1) consequential bodily injuries to family members if their injuries are the direct consequence of bodily injury to the employee; or
>
> 2) the damages resulting from consequential bodily injuries to family members if their injuries are the direct consequence of the employee's employment with plaintiffs.

Ambiguous provisions must be construed in the insured's favor. *Gelman Sciences, supra* at 318. Generally, injuries arise out of employment

> "[w]hen there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed, and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment." [*Dean v Chrysler Corp*, 434 Mich 655, 659-660; 455 NW2d 699 (1990), quoting *Rucker v Michigan Smelting & Refining Co*, 300 Mich 668, 671; 2 NW2d 808 (1942).]

Here, the child's injury was caused by exposure to lead dust carried by his father from his employment. Therefore, the child's injury can fairly be traced to the employment as a contributing proximate cause. Because the exclusion as written is ambiguous, plaintiffs are arguably covered by the instant employer's liability insurance policy and defendants had a duty to defend plaintiffs in the underlying action. See *Royce, supra*.

Affirmed.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Janet T. Neff